IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1359. 44

FRED Y. OYAMA AND KAJIRO OYAMA,

Petitioners,

vs.

STATE OF CALIFORNIA.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The State of California presents herewith its brief in opposition to the petition of Fred Y. Oyama and Kajiro Oyama for a writ of certiorari to the Supreme Court of the State of California, which petition seeks to review the judgment and decision reported at 29 Advance California Reports, 157, 173 P. (2d) 794.

Statement of the Case.

The complaint alleged in substance: That Kajiro Oyama and his wife, Kohide Oyama, are natives and citizens of Japan, and, consequently, ineligible to citizenship in the United States; that they purchased certain agricultural land in San Diego County for their own use and benefit in violation of the Alien Land Law, taking title to the land in the name of their minor son, Fred Yoshihiro Oyama, a citizen of the United States.

Defendant's answer admitted the race and citizenship of the parents, Kajiro Oyama and Kohide Oyama, but alleged as an affirmative defense [R. 54, 55] that the transaction constituted a *bona fide* gift from the parents to the child. The language of the answer is as follows:

> "Defendants aver that Kajiro Oyama, the father, furnished the funds and/or credits to purchase the said property as a gift for his child, Fred Y. Oyama, and that said entire transaction was a *bona fide* gift and not a subterfuge and fraud upon the People of the State of California, as alleged in the complaint."

It was further conceded by defense counsel in his opening statement at the trial [R. 80] that the burden of proof rested on the defendants to sustain their affirmative defense and to overcome the presumption set forth in Sec. 9 of the Alien Land Law (Stats. 1921, p. lxxxiii, as amended by Stats. 1923, p. 1024, Deering's Gen. Laws, Act 261). Mr. Wirin's statement reads:

> "By way of finality, we think the central situation is the good or bad faith of the transaction. We concede that under the statute there is a presumption and we admit that the burden is upon us to overcome the presumption and we hope to be able to overcome that presumption."

The presumption in question imposed by Section 9 of the Act reads as follows:

> "A *prima facie* presumption that the conveyance is made with such intent (*i. e.*, 'with intent to prevent, evade or avoid escheat') shall arise upon proof of any of the following groups of facts:

(a) The taking of the property in the name of a person other than the persons mentioned in section two hereof (*i. e.*, in the name of an alien eligible to citizenship) if the consideration is paid or agreed or understood to be paid by an alien mentioned in section two hereof (*i. e.*, an ineligible alien)."

Notwithstanding the admission of the answer that the consideration was furnished by the ineligible alien father, and the concession in the opening statement that the burden of proof rested upon the defendants to overcome the presumption that the payment of the consideration tends to establish the beneficial ownership in the ineligible alien rather than in the person whose name title is taken, the defense refused to produce the defendant Kajiro Oyama (the ineligible alien father) as a witness, either as a hostile witness under Section 2055 of the Code Civ Proc. as part of the plaintiff's case [R. 97, 98], or as part of the defendants' case [R. 100]. The defendant Kajiro Oyama was available, as admitted by his counsel [R. 98, 99], and the trial court [R. 103] drew an inference that his testimony would be unfavorable to his case; that is, that the failure of the defense to call one of the principal defendants to the witness stand and, particularly, by stratagem to keep him out of the courtroom so as to make his testimony unavailable to the plaintiff unless subpoenaed amounted to a willful suppression of evidence.

It was further alleged in the complaint [R. 4] and admitted in the answer by failure to deny [R. 53, 55] as well as established by testimony [R. 83, 84] that no

accounts or reports were ever filed with the Secretary of State, or with the County Clerk as required by Section 5 of the Alien Land Law in cases where a valid relation of guardian and ward exists. The trial court specifically found against the affirmative defense [R. 60, 61].

Statement of Questions Presented.

I. As to petitioner Fred Y. Oyama, is any federal question presented where the California Courts determined as a fact that at no time did he have any right, title or interest in the property involved?

II. As to petitioner Kajiro Oyama, is any federal question presented where he disclaimed in all the proceedings in the California Courts any right, title or interest in the property involved?

III. Is there any discrimination here which impinges upon the Fourteenth Amendment?

IV. Is there any support in the record or elsewhere for the charge that the Alien Land Law has been unfairly or unequally administered so as to deny equal protection?

V. As to the statute of limitations, does not the petition fail to disclose wherein any federal or constitutional question was raised in the court below, and fail to disclose any other than a procedural question of California law?

Argument.

I.

Any present claim of ownership by the minor Fred Y. Oyama is precluded by the determination of fact in the Superior Court and the approval by the Supreme Court of California that the factual determination is supported by sufficient evidence. As shown by the preceding statement, counsel for petitioner stated to the Superior Court [R. 80] that the question of fact to be determined was the *bona fides* of his clients. During the presentation of the State's case defense counsel was asked to produce his clients for cross-examination, as contemplated by California Code of Civil Procedure, Section 2055, which was refused. After the State of California had closed its case, defense counsel again declined to produce his witnesses and thus allowed the case to be decided practically by default in spite of his earlier admission that the principal fact to be ascertained by the trial judge was the good faith of his clients. It is settled law in California that the refusal of a party to appear as a witness amounts to a willful suppression of evidence and may be given great weight by the trial court in determining the facts in issue.

Bone v. Hayes, 154 Cal. 759, 765;

People v. Adamson, 27 Cal. (2d) 478 at 493;

Leenders v. Calif. Hawaiian, etc., Co., 59 Cal. App. (2d) 752;

Bertelson v. Bertelson, 49 Cal. App. (2d) 479 at 493;

Winkie v. Turlock Irrigation Dist., 24 Cal. App. (2d) 1, and *Cf.*

Twining v. New Jersey, 211 U. S. 78;

2 Wigmore, Evidence (3d Ed.), 164.

In addition to the refusal of the defendants to testify, reliance was placed by the California Supreme Court upon the statutory presumption contained in section 9 of the Alien Land Law, which reads as follows:

> "A *prima facie* presumption that the conveyance is made with such intent (to prevent, evade, or avoid escheat) shall arise upon proof of any of the following group of facts:
>
> "(a) The taking of the property in the name of a person other than the persons mentioned in Section 2 hereof if the consideration is paid or agreed or understood to be paid by an alien mentioned in Section 2 hereof."

This statutory presumption has been heretofore sustained and upheld in *Cockrill v. California*, 268 U. S. 258, as well as in several decisions of the California courts.

People v. Cockrill, 62 Cal. App. 22;

Takeuchi v. Schmuck, 206 Cal. 782;

People v. Fujita, 215 Cal. 166.

It is clear that the basic claim of petitioner Fred Y. Oyama is that the finding against his ownership of the land is not sustained by sufficient evidence. This, it is submitted, is not a federal question. If in fact Fred Y. Oyama is the owner the State of California does not for a moment question his unqualified rights as a citizen. The basis of the action is the State's assertion that the

name of the minor child was used by the alien parent as a subterfuge for evasion of the law. The determination of that fact by the California Courts deprived the minor of nothing.

Objection is made that evidence was received and considered showing that the alien father and guardian failed and neglected to file the accounts and reports required by the Alien Land Law. It is argued in effect that whatever violations of law committed by the father after the purchase of the land are not attributable to the son. This argument overlooks the point that the basic fact to be determined was the good faith of the parents. Was the land actually a gift from parent to child, or was the transaction merely a sham to conceal from the State the parents' illegal ownership? Surely there is no federal or constitutional question involved in considering the subsequent conduct of the parents as having evidentiary value tending to prove the intention of the alien parents at the time of purchase.

The argument that an unreasonable burden of proof may be placed upon the citizen of Japanese descent is out of place under the facts here involved. No effort was made by the defendants to introduce any evidence, even though witnesses were available. The courts of California have heretofore determined in *People v. Fujita*, 215 Cal. 166, the kind of evidence which sufficiently establishes the good faith of the transaction. Neither the statute nor its application is unreasonably harsh or oppressive. The distinction made in *Heiner v. Donnan*, 285 U. S. 312, cited by petitioners is well illustrated in the *Fujita* case.

In the *Heiner* case a statute created a conclusive presumption that a transfer made without consideration with-

in two years before the death of a donor was made in contemplation of death. The court held there was no doubt as to the power of Congress to create a rebuttal presumption, but held that the attempt to make the presumption conclusive denied due process because of lack of "regard to actualities." Justices Stone and Brandeis dissented, holding that the presumption was reasonable, saying (at 342):

> "The existence of facts underlying constitutionality is always to be presumed, and the burden is on him who assails the selection of a class."

And at 348:

> "The very power to classify involves the power to recognize and distinguish differences in degree between those things which are near and those which are remote from the object aimed at. . . ."

The courts of California have not fully clarified the relative probative value of statutory presumptions as opposed to contrary testimony, but it has been held that a presumption is evidence, and that the trial court may properly conclude that a presumption outweighs in evidentiary value the testimony of many witnesses.

Speck v. Sarves, 20 Cal. (2d) 585;
People v. Chamberlain, 7 Cal. (2d) 257;
Lane v. Whitaker, 50 Cal. App. (2d) 327 at 330.

If, however, the testimony is undisputed and not inherently improbable, it need only be sufficient to balance the presumption. As stated in *Mar Shee v. Maryland Assur. Corp.*, 190 Cal. 1 at 9,

> "A fact is proved as against a party when it is established by the uncontradicted testimony of the

party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and (that) when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case."

See, also, *Speck v. Sarves*, 20 Cal. (2d) 585 and the dissenting opinion of Mr. Justice Traynor at 590, and *Engstrom v. Auburn, etc., Co.*, 11 Cal. (2d) 64 at 70.

But in the case at bar we have the full probative force of several presumptions with no testimony opposed to the presumptions. In such cases the rule is that if the party against whom a presumption operates fails to come forward with substantial evidence tending to prove the non-existence of the facts presumed, his opponent with the burden of proof is entitled to an instruction that the facts exist. (*Wigmore, Evidence*, 3d Ed., Secs. 2487, 2489, 2491; *Thayer, A Preliminary Treatise on Evidence*, 314-315, 317; 1 *Jones, Evidence*, 2d Ed., 54; *Stafford v. Martinoni*, 192 Cal. 724; *People v. Harris*, 169 Cal. 53; *People v. Ellis* 206 Cal. 353; *California Code Civ. Proc.*, Sec. 1961.)

If, therefore, the Alien Land Law is constitutional for any purpose it does not deny due process or equal protection in requiring the defendants to come forward in open court with affirmative evidence of non-violation.

At page 11 of the petition appears the argument that since Section 4 of the Alien Land Law as it read from 1923 (Stats. 1923, Ch. 441, p. 1021) to 1943 (Stats. 1943, Ch. 1059, p. 2999), purported to forbid the appointment of an ineligible alien as guardian, he need not, after his

appointment as guardian, file the reports required by Section 5, which has not been amended since 1923 (Stats. 1923, Ch. 441, p. 1022). This argument overlooks the circumstance that in *Estate of Yano*, 188 Cal. 645, the Supreme Court of California held that due process and equal protection compel the issuance of letters of guardianship in a parent and child relationship. In the instant case the Superior Court in 1935 [R. 59], granted letters of guardianship to Kajiro Oyama, relying undoubtedly on the *Yano* decision in preference to Section 4 as amended in 1923. The California law undoubtedly was such in 1935 that Section 4 was invalid in so far as it forbade the appointment of Kajiro Oyama as guardian. But the provisions of Section 5 apply to all guardians as well as other fiduciaries, and were not complied with. Even though Section 4 did not, before it was repealed and a new Section 4 enacted in 1943, require accounts and reports to be filed in court by guardians, such accounts and reports are required of all guardians by the California Probate Code. Section 1553 requires all guardians to file their accounts with the court annually.

As to the minor Fred Y. Oyama, it is therefore submitted that he is trying to escape from a simple finding of fact based upon sufficient evidence, and that he presents no federal question whatever. (*Bell Telephone Co. v. Pennsylvania*, 309 U. S. 30; *Arrowsmith v. Harmoning*, 118 U. S. 194; *Barrington v. Missouri*, 205 U. S. 483; *Los Angeles F. & M. Co. v. Los Angeles*, 217 U. S. 217; *West v. Louisiana*, 194 U. S. 258; *Prince v. Massachusetts*, 321 U. S. 158.)

II.

The father, ~~Fred Y.~~ Kajiro Oyama, by his verified answer filed in the Superior Court [R. 54-55] denied his ownership of the property, denied that he occupied or cultivated the land as his own, and denied that he at any time had in his own right the beneficial use and enjoyment of the land or the crops grown thereon.

Can he now be heard to attack the constitutionality of an act which resulted in an escheat to the State of California of property in which he asserts no beneficial or other ownership? His position at all times previous to the decision of the California Supreme Court was that he had made a *bona fide* gift to his son. The State's position is that had the trial court found such to be the fact the State would be zealous in protecting such property rights, but that the alien father not only has no interest in the property or in these proceedings—in feed, until the present moment he has not suggested any. It is respectfully suggested that a re-examination of the question of the constitutionality of the California Alien Land Law be deferred until a case is presented in which an alien claims an actual interest in the property. The issue as to Kajiro Oyama seems obviously moot and feigned. (*Market St. Ry. v. Railroad Commission*, 324 U. S. 548; *Natural Milk Producers v. San Francisco*, 317 U. S. 423; *Cincinnati v. Vester*, 281 U. S. 439; *Liberty Warehouse Co. v. Burley Tobacco Growers*, 276 U. S. 71.)

III.

Up to this point we have confined ourselves to the question of jurisdiction of this Court in the instant case, where the father disclaimed all interest and where it was found by the court that the son never acquired any interest. We believe that under these circumstances no justiciable question is here presented.

However, being aware that this Court has jurisdiction in proper cases to reexamine earlier decisions—even though they have been followed and relied upon for many years—we turn to the question as to whether there exists any discrimination impinging upon the Fourteenth Amendment—which issue arises if it is deemed that there is jurisdiction to consider such questions in the instant case.

Petitioners would have us believe that heretofore the subject of discrimination has never received enlightened or liberal consideration. But the fact that Mr. Justice Holmes joined in the opinions deciding the four cases submitted to this Court in 1923,[1] and Mr. Justice Brandeis deemed that no justiciable question was involved therein and that the cases should have been dismissed, is indication to us that such liberal minds have not regarded this legislation as offensive to the Constitution.

Race prejudice and race hatreds, as such, are ugly things. We have neither the desire nor do we believe we are under any necessity to excuse or defend these things

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[1] *Terrace v. Thompson*, 263 U. S. 197; *Porterfield v. Webb*, 263 U. S. 225; *Webb v. O'Brien*, 263 U. S. 313; *Frick v. Webb*, 263 U. S. 326.

which petitioners and the *amici curiae* seek to make the focal point of this case. What we conceive to be the point in question here is something else, viz., the validity of limiting the right to own land to those who can become citizens of this nation (subject, of course, to treaty provisions). Eligibility to citizenship does not rest or depend upon considerations of race, color or creed, as such, as petitioners would have us believe. For example, it can scarcely be said that the prohibition to naturalization of subversive persons set forth in the Naturalization Code (8 U. S. C. Sec. 705) bears any relationship whatever to these things. In recognizing eligibility to citizenship as a proper classification in legislation of the kind here involved we believe it is clear that both this Court and the California courts have acted from considerations far more searching than likes or dislikes addressed to color of skin or form of worship.

If a classification be made by reference to a place of origin, ancestry, or country of allegiance characterized by certain concepts of government or certain ideologies or philosophies of living inimical or at least not conducive to the success, well being or preservation of our republican form of government, the circumstance that a different race or color may also characterize those peoples so identified cannot be said, we believe, to constitute the controlling motive or object. Coincidence may exist in any classification. Many peoples of much greater divergence in color and certainly equally at variance in racial origin, whose concepts have not been hostile to those upon which this nation is founded, have been extended the right of citizenship by this nation.

While the decision of the Circuit Court of Appeals in *Terrace v. Thompson* (274 Fed. 841, at 849), may be regarded as severe when it referred to certain Asiatic peoples as being characterized by "the hall-mark of Oriental despotisms," but it illustrates what we have said. It is plain that it was looking to underlying concepts and tendencies of deepest significance and importance with which the peoples in question were deemed to be imbued, and that questions as to race or color, as such, played no part as a determining factor in the classification.

> "It was deemed (by Congress) that the subjects of these despotisms, with their fixed and ingrained pride in the type of their civilization, which works for its welfare by subordinating the individual to the personal authority of the sovereign, as the embodiment of the state, were not fitted and suited to make for the success of a republican form of government. . . . It is this disqualification put upon them by the federal government to which the state objects, and not their color, although the federal government may have made their race or color the irrefutable evidence of disqualification for citizenship."
>
> *Terrace v. Thompson, supra,* at 849.

We are not without comparatively recent expression from this Court as to the situation in this country as related to the Japanese. Their lack of assimilation, their "solidarity", were discussed with what we consider great candor, fairness and liberality by Mr. Chief Justice Stone in *Hirabayashi v. United States,* 320 U. S. 81 at 96, 87 L. Ed. 1774 at 1784. The social, economic and political conditions contributing to these things were there reviewed. In footnote No. 4 of the decision a summary of the kinds

of so-called discrimination which have been employed without offense to constitutional considerations is set forth. This was a decision sustaining a wartime curfew regulation applicable to *alien and citizen* of Japanese ancestry *alike*. The later decisions of this Court in *Ex Parte Endo*, 323 U. S. 283, 65 S. Ct. 208, and *Korematsu v. United States*, 323 U. S. 214, 65 S. Ct. 193, deal with the rights of *loyal citizens* to freedom from arbitrary detention in relocation centers. The prohibition of the Alien Land Law is not against citizens, but against aliens—those aliens who cannot be bound to us by the oath of allegiance. We are dealing here not with loyalty, but with fraud and deceit, found and determined after a fair trial in open court. If the distinction made by the California statute between eligible and ineligible aliens is to fail because of some inseparable connection with race found to exist, how then can the naturalization and immigration laws escape being struck down on the same ground? This Court has consistently upheld these laws. Further—it has held that the naturalization laws constitute a proper classification in state statutes on the subject here involved.

The naturalization laws are discussed at length in *Terrace v. Thompson*, 263 U. S. 197; 44 S. Ct. 15. It is there stated by this court that, while Congress is not trammeled and may grant or withhold the privilege of naturalization as it sees fit, it is not to be supposed that its acts defining eligibility are arbitrary or unsupported by reasonable considerations of public policy. This Court held:

> ". . . The state properly may assume that the considerations upon which Congress made such classification are substantial and reasonable." (263 U. S. 197, at 220, 44 S. Ct. 15, at 19.)

The argument is made in the briefs filed in support of the petition that while the power of Congress in this field is without limitation that of the state is circumscribed and cannot here rest upon the determination made by Congress. However, this Court held the following in *Terrace v. Thompson, supra:*

> ". . . Two classes of aliens inevitably result from the Naturalization Laws—those who may and those who may not become citizens. The rule established by Congress on this subject, in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership as defined in the act." (263 U. S. 197, at 220; 44 S. Ct. 15, at 19.)

The attack of petitioners would appear to be leveled at Congress, rather than at the legislature of the state. It is not to be denied that there has been discrimination in our naturalization laws ever since they were first enacted in 1790. Since then the enumeration of the peoples to whom the privilege is granted has been expanded at various times and it is not improbable that it may one day embrace all peoples of the earth. On the other hand, critical exigencies may, within the realm of possibility, indicate a further narrowing of the privilege—perhaps from considerations not heretofore encountered. Until such time, however, as it may be all-inclusive, those denied the right of citizenship constitute a distinct class, and the classification one which this Court has held furnishes a reasonable basis for state legislation as to ownership of land. It has long been held that a state may even deny this right to all aliens. Here the right is withheld, subject to treaty provisions, from those only who cannot under our laws be bound to us by the oath of allegience.

While reference to treaty rights may have slight bearing upon the question of discrimination, it is of some interest to note that, so far as the right of Japanese subjects to own land in this nation is concerned, provision for this could have been readily inserted in the Treaty of Commerce and Navigation of 1911 (37 Stat. 1504-1509) between the United States and the Empire of Japan. However, Japan did not wish it so. In construing that treaty this Court held in *Terrace v. Thompson*, 263 U. S. 197, at 223; 44 S. Ct. 15, at 21:

> "The letter of Secretary of State Bryan to Viscount Chinda, July 16, 1913, shows that, in accordance with the desire of Japan, the right to own land was not conferred."

In criticising the eligibility-to-citizenship classification of the Alien Land Law petitioners indulge in speculative comparisons as to the degrees of loyalty to be found among those eligible and those not eligible to become citizens. They contend that it is more harsh and oppressive to prohibit ownership of land to ineligible aliens than it would be to make the restriction apply to those who are eligible but who have not declared their intention to become citizens. We think it obvious that instead of being more restrictive the rule adopted is far more liberal. It extends the right to all who are given the privilege of becoming citizens, for each one of these, upon becoming acquainted with our country and its customs and concepts of government, may elect to apply for citizenship and subscribe to the oath of allegiance, whereupon he unquestionably has the same rights as every other citizen.

The speculative comparison of possible loyalty to this nation of one ineligible to become a citizen with a possible

lack of loyalty on the part of one already a citizen or at least eligible to become such, which is indulged in by petitioners, involves a question of the personal equation, an individualized attitude of heart and mind—something as to which classifications upon a reasonable basis cannot be and are not required to be infallible.

IV.

On page 18 of the petition, as well as in portions of the *amici curiae* briefs, are found statements that the Alien Land Law has been enforced discriminately against the Japanese in California. Nowhere is reference made to any authentication or support in the record for any of these statements. No instance can be shown where this law has been unconstitutionally applied or administered. Whatever may be the bare assertions made as to number of proceedings or nationality of the defendants, no fair inference can be drawn therefrom as to their merits. It would be equally as proper for us to state the number of instances in which proceedings have *not* been commenced, or the number of instances in which the defendants have sought to bring about settlements by compromise.

Petitioners' assertion that the Alien Land Law is enforced only against Japanese offenders might be answered by the statement that they constitute the offenders. Congress has admitted almost no Chinese since the Chinese Exclusion Laws of 1882. Filipinos have never been forbidden to own land in California. (*Alfarà v. Fross*, 26 Cal. (2d) 358.) Hindus have in fact violated the Alien Land Law, although not so persistently as the Japanese, and have been prosecuted for such violations.

Since Congress in 1924 adopted amendments to the Immigration Laws which curtailed Japanese immigration to a substantial degree, the influx of ineligible aliens seeking to ~~require~~ acquire large areas of land has been much less. Up to that time at least the threat of appreciable portions of the state's agricultural lands passing to those ineligible to make this their country of sworn allegiance presented a serious problem amounting to a "clear and present danger." In a very real sense it has been believed that it was owed to the great majority who obeyed and observed the law that it should be enforced against those who defied and violated it.

We have yet to have any instances pointed out in which the administration of the statute has been discriminatory. When violations of the law have been discovered, proceedings have been commenced—as directed by its provisions. The law has long been upon the statute books and has been repeatedly sustained as to its constitutionality by the courts. No justification whatever can be shown for citing *Yick Wo v. Hopkins*, 118 U. S. 356, or *Hill v. Texas*, 316 U. S. 400, as bearing any relation to the administration of the Alien Land Law.

V.

The statute of limitations is the kind of procedural question which the highest court of a state may appropriately decide for itself without impinging upon the federal domain. (*Preston v. Chicago*, 226 U. S. 447; *Moran v. Horsky*, 178 U. S. 205; *Wood v. Chesborough*, 228 U. S. 672; *Harrison v. Myer*, 92 U. S. 111; *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287.) Particularly does this observation apply when no sugges-

tion of a federal question is made in the courts below. The question of the running of the statute of limitations was briefed and argued both on demurrer in the Superior Court and on appeal in the California Supreme Court. *Nowhere* in the proceedings was it suggested that a federal question was involved, nor does the petition assert that the point was raised below as a federal question, nor has any suggestion been heretofore made that a constitutional question was involved. (*Barrington v. Missouri*, 205 U. S. 483; *Radio Station WOW v. Johnson*, 326 U. S. 120; *Spies v. Illinois*, 123 U. S. 131; *Rogers v. Clark Iron Co.*, 217 U. S. 589.) The United States Supreme Court has no jurisdiction to consider a federal question not presented to the state courts even though another federal question properly raised is presented. (*Montana v. Rice*, 204 U. S. 291.)

The argument contained in the brief of American Civil Liberties Union, *amicus curiae*, that the United Nations Charter contains treaty provisions in conflict with the California Alien Land Law is answered by the same argument and authorities. The point was not raised or passed upon in the State courts and cannot be presented here. The State court has decided that title to one parcel has been in the State of California since 1934, and as to the other parcel since 1937 [R. 59, 62]. Section 7 of the Alien Land Law has provided at all times since 1923 that escheat is automatic. The statement by the California Supreme Court [R. 118] is, "Title vested in the state upon these dates, and later legislation has no effect upon that title."

The discussion found at R. 119 concerning the running of the statute of limitations makes it clear that at no time

did the petitioners enjoy any vested right even as a right of repose. The possession of the ineligible aliens was tortious, scrambling, and has been determined as a matter of local law and local legislative intent not to have conferred any rights or defenses upon the petitioners. The two cases cited in the petition, *Campbell v. Holt*, 115 U. S. 620, and *Chase Securities Corp. v. Donaldson*, 325 U. S. 304, well illustrate the distinction between a vested or clearly established legal right or title which is protected against subsequent interference by the state, and the sort of inchoate and dubious position in which petitioners found themselves. It is also settled as a matter of local law that acts of limitation affect the remedy and not the right.

Doehla v. Phillips, 151 Cal. 488;
Davis & McMillan v. I. A. C., 198 Cal. 631;
Rhoda v. Alameda County, 34 Cal. App. 726 at 735;
Spect v. Spect, 88 Cal. 437;
Puckhaber v. Henry, 152 Cal. 419;
Olinda Irrigated Lands Co. v. Yank, 27 Cal. App. (2d) 58 at 61.

To make the distinction even clearer, it was conceded by the State before the California Supreme Court that the minor citizen Fred Oyama or any other person not under disability has legal capacity to acquire as against the State a good title by prescription or adverse possession, the property not being owned by the State in a governmental but only in a proprietary capacity. (*People v. Kings Development Co.*, 177 Cal. 529; *People v. Center*, 66 Cal. 551.) The ineligible alien father, by contrast, could not acquire a title by adverse possession, being con-

tinuously incapable of owning or acquiring any interest in land.

Adverse possession under the California decisions is required to be pleaded and proved as an affirmative defense, which was not done here.

Reed v. Smith, 125 Cal. 491;
Warden v. Bailey, 133 Cal. App. 383.

Mere hostile occupancy does not defeat an owner's title.

McKelvey v. Rodriguez, 57 Cal. App. (2d) 223;
Westphal v. Arnoux, 51 Cal. App. 532.

Since, therefore, as to private owners the California courts declare that a mere interloper or trespasser must, in order to defend a possessory action successfully, assert a positive defense of adverse possession instead of relying on the mere passage of time, there is no discrimination or denial of due process in the ruling of the California Supreme Court. Instead, the State has merely been granted the same treatment as any other litigant.

It is not contended that the State of California can revive or that the legislature or courts intended to revive a cause of action previously and effectively barred by the running of a statute of limitations. It is contended that the determination of local legislative intent and other aspects of local statutory interpretation are exclusively for the determination of the California courts.

While petitioners do not make a positive claim that there was any "lifting of the bar of the statute of limitations" in the Alien Land Law as applied to this case, they do complain (Pet. 27) of the clarification made by the 1945 legislature and suggest that the California Supreme Court

"relied" upon this "to a very considerable extent." What that Court did in its decision was to state the "clear and unmistakable purpose of the Alien Land Law at all times since it was enacted. . . ." and to hold that its provisions are "entirely inconsistent with a statute of limitations." There can be no question as to the effect of this determination. But even had the California legislature in 1945 enacted a measure basically and wholly changing a provision theretofore in effect—instead of, as it did, merely declaring and clarifying the preexisting law which was under attack—the only authorities cited by petitioners (Pet. 27) do not support their contention. *Sinclair & Carroll Co. v. Interchemical Corp.*, 325 U. S. 304, 65 S. Ct. 1137, upheld in essence *Campbell v. Holt*, 115 U. S. 620, 6 S. Ct. 209, and decided that even where the Minnesota legislature had enacted a new statute during the pendency of the litigation, lifting the bar of the preexisting statute of limitations, and this new change was followed by the Minnesota Supreme Court, the Fourteenth Amendment was not impinged upon.

> " . . . Whatever grievance appellant may have at the change of policy to its disadvantage, it acquired no immunity from this suit that has become a federal constitutional right."
>
> *Sinclair & Carroll Co. v. Interchemical Corp.*, 325 U. S. 304, at 316, 65 S. Ct. 1137, at 1143.

In the *Sinclair & Carroll Co.* case a new, a changed law was put into effect during the pendency of the litigation. In the instant case no change was made. The court merely pronounced what the law had always been, since its inception.

Conclusion.

It is respectfully submitted that the petition for a writ of certiorari to the Supreme Court of California be denied for the following reasons:

1. No federal or constitutional question is presented as to either petitioner Kajiro Oyama or Fred Y. Oyama, the former having disclaimed all interest and the latter having been found never to have acquired an interest.

2. There is no discrimination to be found in the Alien Land Law which impinges on the Fourteenth Amendment.

3. Neither in the record nor elsewhere can it be shown that this law has been unconstitutionally applied or administered.

4. No federal constitutional right has been denied by the California Supreme Court's ruling that the Alien Land Law is not subject to a statute of limitations.

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